

The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

O'DONNELL/SALVATORI, INC., an Illinois  
corporation,

Plaintiff,

v.

MICROSOFT CORPORATION, a Washington  
corporation,

Defendant.

No. 2:20-cv-00882-MLP

**STIPULATION AND ORDER  
REGARDING DISCOVERY OF  
ELECTRONICALLY STORED  
INFORMATION**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information ("ESI") in this matter.

The parties began with the District's Model ESI Agreement, and have identified departures from the model in a redlined copy, attached as Exhibit 1.

**A. General Principles**

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

**B. ESI Disclosures**

Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each party shall disclose:

1. Custodians. The five custodians most likely to have discoverable ESI in their possession, custody, or control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under the custodian's control. While the parties here designate five custodians, that number might not suffice, and the parties will meet and confer if adjustment of this number is necessary based on the complexity, proportionality and nature of the case.

2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared drives, servers), if any, likely to contain discoverable ESI.

3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain discoverable ESI (e.g., third-party email providers, mobile device providers, cloud storage) and, for each such source, the extent to which a party is (or is not) able to preserve information stored in the third-party data source.

4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

5. Foreign data privacy laws. Nothing in this Order is intended to prevent either party from complying with the requirements of a foreign country's data privacy laws, e.g., the European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet and confer before including custodians or data sources subject to such laws in any ESI or other discovery request.

**C. ESI Discovery Procedures**

1. On-site inspection of electronic media. Such an inspection shall not be required absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

1           2.     Search methodology. The parties shall timely confer to attempt to reach  
2 agreement on appropriate search terms and queries, file type and date restrictions, data sources  
3 (including custodians), and other appropriate computer- or technology-aided methodologies,  
4 before any such effort is undertaken. The parties shall continue to cooperate in revising the  
5 appropriateness of the search methodology.

6           a.     Prior to running searches:

7                   i.     The producing party shall disclose the data sources (including  
8 custodians), search terms and queries, any file type and date restrictions, and any other  
9 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable  
10 information. The producing party may provide unique hit counts for each search query. In the  
11 event that a receiving party believes that the proposed search terms are insufficient, the parties  
12 shall meet and confer to attempt to reach agreement on the producing party's search terms and/or  
13 other methodology.

14                   ii.    If search terms or queries are used to locate ESI likely to contain  
15 discoverable information, the requesting party is entitled to, within 14 days of the producing  
16 party's disclosure, add no more than 10 additional search terms or queries to those disclosed by  
17 the producing party absent a showing of good cause or agreement of the parties.

18                   iii.   Focused terms and queries should be employed; broad terms or  
19 queries, such as product and company names, generally should be avoided. A conjunctive  
20 combination of multiple words or phrases (e.g., "computer" and "system") narrows the search  
21 and shall count as a single search term. A disjunctive combination of multiple words or phrases  
22 (e.g., "computer" or "system") broadens the search, and thus each word or phrase shall count as a  
23 separate search term unless they are variants of the same word. The producing party may  
24 identify each search term or query returning overbroad results demonstrating the overbroad  
25 results and a counter proposal correcting the overbroad search or query.

26           b.     After production:

27                   i.     Within 21 days of the producing party notifying the receiving party

1 that it has substantially completed the production of documents responsive to a request, the  
2 responding party may request no more than 5 additional search terms or queries. The  
3 immediately preceding section (Section C(2)(a)(iii)) applies.

4 3. Format.

5 a. ESI will be produced to the requesting party with searchable text, in the  
6 following format: generally single-page TIFFs with load files for e-discovery software that  
7 includes metadata fields identifying natural document breaks and also includes companion OCR  
8 and/or extracted text files; and native files for Excel documents, PowerPoint slides, and  
9 multimedia files.

10 b. Unless otherwise agreed to by the parties, files that are not easily  
11 converted to image format, such as spreadsheets, database, and drawing files, will be produced in  
12 native format.

13 c. Each document image file shall be named with a unique production  
14 number (Bates Number). Documents produced in native format will be assigned a Bates  
15 Number and produced with a corresponding load file. Original file names should be preserved  
16 and included in the load file metadata. File names should not be more than twenty characters  
17 long or contain spaces. When a text-searchable image file is produced, the producing party must  
18 preserve the integrity of the underlying ESI, i.e., the original formatting, the metadata (as noted  
19 below) and, where applicable, the revision history.

20 d. If a document is more than one page, the unitization of the document and  
21 any attachments and/or affixed notes shall be maintained as they existed in the original  
22 document.

23 4. De-duplication. The parties may de-duplicate their ESI production across  
24 custodial and non-custodial data sources after disclosure to the requesting party, and the  
25 duplicate custodian information removed during the de-duplication process tracked in a  
26 duplicate/other custodian field in the database load file.

27 5. Email Threading. The parties may use analytics technology to identify email

1 threads and need only produce the unique most inclusive copy and related family members and  
 2 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce  
 3 a less inclusive copy.

4 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only  
 5 the following metadata fields need be produced, and only to the extent it is reasonably accessible  
 6 and non-privileged: document type; custodian and duplicate custodians; author/from;  
 7 recipient/to, cc and bcc; title/subject; email subject (to the extent email subject is not duplicative  
 8 of title/subject); file name; file size; file extension; date and time created, sent, modified and/or  
 9 received; and hash value. The list of metadata type is intended to be flexible and may be changed  
 10 by agreement of the parties, particularly in light of advances and changes in technology, vendor,  
 11 and business practices.

12 7. Hard-Copy Documents. The parties elect to produce hard-copy documents in an  
 13 electronic format. The production of hard-copy documents will include a cross-reference file  
 14 that indicates document breaks and sets forth the Custodian or Source associated with each  
 15 produced document. Hard-copy documents will be scanned using Optical Character Recognition  
 16 technology and searchable ASCII text files will be produced (or Unicode text format if the text is  
 17 in a foreign language), unless the producing party can show that the cost would outweigh the  
 18 usefulness of scanning (for example, when the condition of the paper is not conducive to  
 19 scanning and will not result in accurate or reasonably useable/searchable ESI). Each file shall be  
 20 named with a unique Bates Number (e.g. the Unique Bates Number of the first page of the  
 21 corresponding production version of the document followed by its file extension).

#### 22 **D. Preservation of ESI**

23 The parties acknowledge that they have a common law obligation, as expressed in Fed.  
 24 R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information  
 25 in the party's possession, custody, or control. With respect to preservation of ESI, the parties  
 26 agree as follows:

27 1. Absent a showing of good cause by the requesting party, the parties shall not be

1 required to modify the procedures used by them in the ordinary course of business to back-up  
 2 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
 3 possession, custody, or control.

4 2. The parties will comply with their obligations to supplement under Fed. R. Civ. P.  
 5 26(e).

6 3. Absent a showing of good cause by the requesting party, the following categories  
 7 of ESI need not be preserved:

- 8 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 9 b. Random access memory (RAM), temporary files, or other ephemeral data  
 10 that are difficult to preserve without disabling the operating system.
- 11 c. Online access data such as temporary internet files, history, cache,  
 12 cookies, and the like.
- 13 d. Data in metadata fields that are frequently updated automatically, such as  
 14 last-opened dates (see also Section (E)(5)).
- 15 e. Backup data that are duplicative of data that are more accessible  
 elsewhere.
- 16 f. Server, system or network logs.
- 17 g. Data remaining from systems no longer in use that is unintelligible on the  
 18 systems in use.
- 19 h. Electronic data (e.g., email, calendars, contact data, and notes) sent to or  
 20 from mobile devices (e.g., iPhone, iPad, Android devices), provided that  
 21 a copy of all such electronic data is automatically saved in real time  
 elsewhere (such as on a server, laptop, desktop computer, or “cloud”  
 storage).

## 22 **E. Privilege**

23 1. With respect to privileged or work-product information generated after the filing  
 24 of the complaint, parties are not required to include any such information in privilege logs.  
 25 Parties also are not required to log communications with outside counsel dated after the filing of  
 26 the complaint.  
 27

1           2.       Activities undertaken in compliance with the duty to preserve information are  
2 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

3           3.       The parties agree to abide by Fed. R. Civ. P. 26(b)(5) with respect to documents  
4 withheld from production on the basis of a privilege or protection. Any privilege logs shall  
5 include a unique identification number for each document and the basis for the claim (attorney-  
6 client privileged or work-product protection). For ESI, the privilege log may be generated using  
7 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or  
8 title; and date created. The parties may also meet and confer over other appropriate methods of  
9 logging privileged or protected material. Any privilege logs will be produced no later than 30  
10 days before the deadline for filing motions related to discovery, unless an earlier deadline is  
11 agreed to by the parties.

12           4.       Redactions need not be logged so long as the basis for the redaction is clear on the  
13 redacted document.

14           5.       Pursuant to Fed. R. Evid. 502(d), the production of any documents in this  
15 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,  
16 constitute a waiver by the producing party of any privilege applicable to those documents,  
17 including the attorney-client privilege, attorney work-product protection, or any other privilege  
18 or protection recognized by law. Information produced in discovery that is protected as  
19 privileged or work product shall be immediately returned to the producing party, and its  
20 production shall not constitute a waiver of such protection.

1 DATED: November 25, 2020

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9 DATED: November 25, 2020

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17 **ORDER**

18 Based on the foregoing, IT IS SO ORDERED.

20 DATED: November 30, 2020

21   
22 MICHELLE L. PETERSON  
23 United States Magistrate Judge  
24  
25  
26  
27



CERTIFICATE OF SERVICE

I hereby certify that on this 25<sup>th</sup> day of November, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have electronically mailed the document to the following non CM/ECF participants:

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DATED at Mercer Island, Washington this 25<sup>th</sup> day of November, 2020.

By s/ Ambika K. Doran  
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